No. 89-272

In The

Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually and as Mayor of the Township of Millstone, DIANAMIC INDUSTRIES, THE TOWNSHIP OF MILLSTONE, a Municipal Corporation of State of New Jersey, and COBBLESTONE-PENN LIMITED PARTNERSHIP,

Petitioners,

vs.

RICHARD GIMELLO, EXECUTIVE DIRECTOR, AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

Based on the foregoing, the issues appealed by the Millstone petitioners are:

1. Do the actions of respondents in this situation represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property?

2. Is the statutory scheme embodied in the New Jersey Major Hazardous Waste Facilities Siting Act abhorrent to the United States Constitution in failing to guarantee property owner full and adequate compensation for temporary and permanent loss of the beneficial use of their property?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those listed in the caption herein. In addition this matter was consolidated below with a matter brought by the following plaintiffs:

THE TOWNSHIP OF EAST GREENWICH, a Municipal Corporation of the State of New Jersey; CARL A. BRESSLER; WALTER P. GEORGE; HARGREEN ASSOCIATES; MILTON S. DUNN; FREDERICK WAIBEL; ADELBERT THOMPSON; AND ANNA PENNELL.

The defendants in this consolidated case were identical with respondents herein.

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OPINION BELOW

The opinion of the Supreme Court of New Jersey dated May 4, 1989, is reported at 115 N.J. 54 (1989).

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court to review the decision below by writ of certiorari is conferred by 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part:

> "... .[N]or shall private property be taken for public use, without just compensation."

The New Jersey Major Hazardous Waste Facilities Siting Act is set forth at N.J.S.A. 13:1E-48, *et seq.*

STATEMENT OF THE CASE

The New Jersey Hazardous Waste Siting Commission was established in 1981 pursuant to L. 1981, c. 279 (N.J.S.A. 13:1E-48, *et seq.*) According to the statute, by September 10, 1982, the Commission was to have available the criteria for siting facilities (N.J.S.A. 13:1E-57(a)) and a hazardous waste master plan indicating what facilities were needed (N.J.S.A. 13:1E-58(a)).

In actual fact, the criteria were promulgated in June, 1983 — some 10 months after the statutory deadline — and the master plan in late March, 1985 — some 30 months after the statutory deadline.

In order to site a facility the Major Hazardous Waste Facilities Siting Act requires a two-step process:

1. formal designation by the Commission of a specific site — N.J.S.A. 13:1E-59 — a process which will take a minimum of 17.5 months from its formal initiation. As of April 1, 1987, this process had not yet begun; *then*

2. approval by New Jersey Department of Environmental Protection of a private entrepreneur's application to build an incinerator on the designated site — N.J.S.A. 13:1E-60 — a process which will take a minimum of 23.5 months.

There is nothing in the statute which provides for compensation to the property owner for property losses suffered prior to the formal designation of a site. Nor can the owner be compensated for such losses during or after the application process. To the contrary, the use of eminent domain powers by the Commission is specifically limited to a situation in which an *approved* applicant for a specific designated site has failed to purchase the site after good-faith bargaining. N.J.S.A. 13:1E-81. Thus, the statute precludes payment of *any* compensation by respondents until not less than 41 months *after* the formal designation process begins.

Moreover, there is nothing in the Act which guarantees that a formally-designated site will ever be the subject of an application. In fact the Commission, *proprio motu* or on application of a municipality, can de-designate an unused site at any time after final designation. N.J.S.A. 3:1E-59(5)(e). In this case, there is no statutory provision for compensation to property owners for any interim loss of use of their property.

On February 14, 1986, after repeated failure to meet its statutory deadlines, the Commission announced specific sites, *inter*

alia, those in Millstone Township — designated by Tax Map Block and Lot Number — as "candidate" sites for future formal designation. That announcement appears *not* to be part of the statutory designation process as set forth at N.J.S.A. 13:1E-59. It was an extra-statutory pre-designation "nomination".

In that February, 1986, announcement the respondent Commission targeted 3 lots on the Millstone Tax Map containing some 160± acres. As of April 1, 1987, respondent Commission had completed preliminary testing on the Millstone site and has voted to consider formally designating Millstone as a site at some point in the foreseeable future.

In addition to these lots, a number of other adjacent Millstone lots are involved because the Act requires a "buffer" between the incinerator itself (a 5-acre facility) and any place of regular habitation or employment (N.J.S.A. 13:1E-57). The owners of properties adjacent to those designated will have no way of knowing how much, if any, of their property may be subject to condemnation unless and until a specific application for an incinerator at a specific physical location is approved. Only once a facility is given a specific physical site during the application process (an absolute minimum of 41 months after formal designation begins) can adjacent property owners know what will remain of their property.

Even though the February, 1986 announcement of Millstone as a potential site was not a formal designation of the site, the effect on the properties so targeted — and those within the "buffer" half-mile from the site — was immediate and devastating. For example, as of January 28, 1986, petitioner Cobblestone-Penn was prepared to begin construction of a 190-unit senior citizens' mobile home park and community office center on a property adjacent to the designated site. Upon hearing of the proposed designation, the lending institutions previously prepared to give

construction financing withdrew and no lender has subsequently been found to enable the project to proceed.

This is understandable in view of the fact that procedures under the Hazardous Waste Facilities Siting Act:

1. provide no certainty as to how much of the site could eventually be taken;

2. provide no fixed timetable as to when a final designation would be made *or* when, if ever, a facility would be built;

3. provide no guarantee that petitioners will ever receive full compensation for their temporary or permanent loss of the use of their property.

In addition to all of the above difficulties, in the present case the location of a senior citizens' mobile home park next to a hazardous waste incinerator is virtually precluded by the problems of emergency evacuation of older people in case of an accident at the toxic waste incinerator and their greater susceptibility of respiratory ailments, etc.

A review of the statute *sub judice* and facts of which the Court can take judicial note indicate that *once the formal designation occurs* the property owners face a minimum of 41 months and more probably up to 84 months before *any* compensation will come to the property owners.

The essence of petitioners' complaint is that the actions of respondents have effectively deprived petitioners of any beneficial use of their property and they are entitled to compensation now because of that deprivation; moreover, the the Major Hazardous Waste Facilities Siting Act is unconstitutional because it precludes

such compensation now and does not guarantee property owners full and adequate compensation later. *See* United States Constitution, Fifth and Fourteenth Amendments.

Based on the foregoing, the issues appealed by the Millstone petitioners are:

1. Do the actions of respondents in this situation represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property?

2. Is the statutory scheme embodied in the New Jersey Major Hazardous Waste Facilities Siting Act abhorrent to the United States Constitution in failing to guarantee property owners full and adequate compensation for temporary and permanent loss of the beneficial use of their property?

REASONS FOR GRANTING THE WRIT

I.

The actions of respondents represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property.

For most of this century our federal and state courts have wrestled with the delicate balance between constitutionally guaranteed private property rights and governmental action for the common good which abridges those rights.

Judicial analysis through this entire time, whether analyzing claims of over-broad regulation, inverse condemnation, or contemplated or actual takings, has reiterated that each case must be decided in its unique factual setting. Each case involves a

> "question of degree [which] cannot be disposed of by general propositions". *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) at 416.

> "Indeed we have frequently observed that whether a particular restriction will be rendered invalid by the government failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case' " *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958).

> "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and particularly the extent to which the

> regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) at 124.

Given this ongoing judicial concern with a factual analysis against which to measure the constitutional mandate's applicability it is particularly surprising that the court below affirmed the dismissal of petitioners' claims on the respondents' motion for summary judgment.

In the present case, respondents claim that neither the February, 1988 targeting of the specific Millstone site nor even formal designation itself constitutes a "regulation" or a "taking" which is compensable. Petitioners, however, submit that, on the specific facts as they are juxtaposed with the statutory scheme embodied in the Major Hazardous Waste Facilities Siting Act:

> 1. Private petitioners herein have been denied virtually all reasonable use of their land under circumstances which demand immediate compensation;
>
> 2. The Act precludes such interim compensation as the constitutional mandates require; and
>
> 3. The Act is so written as to create serious doubt as to whether full and adequate compensation would ever be paid to petitioners even if and when condemnation proceedings finally occurred.

It must be emphasized *ab initio* that the present case is fundamentally different from other condemnation cases in almost every respect. The factors which make this situation *sui generis* are.

1. The specific purpose of the governmental action herein.

2. The uncertainty as to the time and exact location of the proposed taking.

3. The nature of plaintiff's specific rights here created by statute.

4. The specific procedure employed in the Act *sub judice.*

a. *The Nature of the Action.* The traditional purposes of condemnation include such improvements as parks, roads and more recently, renewal areas. In such cases the use contemplated, while an inconvenience in the short run to property owners, is in the main a general *and* a specific benefit in that the improvement usually seems to enhance property values. Common experience can serve as a guide for the owner and the court as to what happens when such improvements are installed. For example, improved road access or a redeveloped neighborhood will improve values and the general business climate.

In the present case, on the other hand, petitioners face designation as a site for the incineration of hazardous wastes. Almost no problem generates the kind of public fear and antipathy which exposure to hazardous wastes does. It was for this very reason that the Major Hazardous Waste Facilities Siting Act was proposed — to provide a vehicle for siting facilities which, absent coercive government action, simply could not be sited.

Given the extensive and intensely emotional public concern (4,000 angry residents at a Siting Commission in Burlington Township in April, 1986; 6,000 at the Millstone Meeting in September, 1986) and given the fact that there are few if any such

major incinerators currently functioning, the Court may take judicial notice that this new area of government action-designating hazardous waste disposal sites — is significantly different from designating part of a property for a road or a park.

b. *Uncertainty as to time and location.* The statutory time for the siting process can in theory be as short as 41 months. On the other hand — and more probably — it could be as long as 86 months. During this time petitioners do not know if their property will be utilized.

But even if the property owners assume that their property will eventually be taken they do not know which part or how much of their property may be condemned. The Commission has proposed designation of 3 lots with a total land area of 160± acres. The incinerator could, after these lots are designated, be located almost anywhere on them. This means that until the facility is actually located, petitioners — and adjacent owners such as Cobblestone-Penn — will not know how much of their land is subject to condemnation. In Cobblestone-Penn's case, it could be virtually nothing or virtually all.

Thus a contemplated state action having the most negative possible effect on property development can in this case hang like a poisoned yellow cloud over a specified area of Millstone Township whose exact dimensions are not fixed for a period of time which is totally uncertain.

c. *Uncertainty as to the Effect on the Surrounding Areas.* In the present case, petitioner Cobblestone-Penn has approvals for the construction of a 190-unit senior citizens' mobile home park.

Given the presumed health rationale behind the statutory prohibition against any permanent habitation with ½ mile of the

site the very existence of the hazardous waste incinerator would preclude the existence of a senior citizens' mobile home park next door, since the presence of the elderly, especially in large numbers, would present a real hazard as to emergency evacuation in case of a disaster at the incinerator. Even on an everyday basis, the air quality would probably not be healthy for senior citizens whose susceptibility to ailments in general and to respiratory ailments in particular may not be on a par with the citizenry in general.

It is crystal clear, therefore, that the very presence of the incinerator would irrevocably doom the area in terms of the use for which petitioner Cobblestone-Penn has a vested statutory right to utilize and develop his property.

Since the construction of a hazardous waste incinerator would destroy petitioner Cobblestone-Penn's ability to use his property for the zoned use because of the deterioration of the entire area, *a fortiori* the threat of same prevents the development of his property, since the final determination as to if, where and when an incinerator will be located merely will not end the damage but surely confirm it.

d. *Plaintiff's Vested Rights.* As to at least one petitioner the facts support a different status from that of the typical owner of vacant land subjected to a condemnation.

Cobblestone-Penn is a partnership which purchased a tract of land which had been granted site plan approval for a 190-unit senior citizens' mobile home park and office community center.

Prior to purchase in 1984, petitioner specifically inquired of the Township Planning Board if the approvals were still in effect. The Board in a public vote affirmed same on November 28 and December 12, 1984. The Board, through its attorney, communicated these actions to the applicant. Thus, the applicant

purchased the property in full reliance on the statutory protections afforded by the Municipal Land Use Law that would enable it to construct its senior citizens' mobile home park.

By late January, 1986, Cobblestone-Penn was ready to file its building plans. Two weeks later, on February 14, 1986, the respondent announced the the property adjacent to Cobblestone Penn's was a potential site for a hazardous waste incinerator and, thus, that part of their property might, therefore, eventually be subject to condemnation.

e. *The Specific Procedures in the Act.* Contrary to what the court below assumed from its reading of the statute, it is fair to say that the threat of designation as a hazardous waste incinerator site may well hang over the affected properties for a period of not less than 56 months and perhaps as long as 92 months!

Basically, N.J.S.A. 13:1E-59 calls for a *minimum* theoretical time of 17.5 months from the time a site is first designated. To this must be added, in reality, the actual time the administrative hearing will take. Given the complexity of the issues, the need for adequate discovery, etc., it is unlikely that the hearing will be completed in less than 4 months. Moreover, the appeals must be deemed to take somewhat longer than the theoretical minimum set forth in the Rules. A *conservative* estimate, even with expedition, would be 12 months between the Appellate Division and the State Supreme Court. Thus, the actual time for designation will, using common sense, be closer to *33* months. This is not a hypothetical construct but an actual analysis of the time frames set forth in the statute and a conservative estimate of appeal time — of which the Court can take judicial notice.

This 33 months *begins* when the Commission formally designates the site. In actuality, the Commission announced the

specific properties as candidates, by Block and Lot numbers, in February, 1986. Yet, as of April 1, 1987, these specific properties, while known to the world as candidate hazardous waste disposal sites, have yet to be "designated". The destruction of petitioner's use of their property, therefore, began in February, 1988. This means the the total time required before certainty is achieved even as to formal designation — but not necessarily as to actual site location and impact on properties like Cobblestone-Penn's — will actually be closer to 48 months!

But this 48 month "designation" process does not produce one cent of compensation nor one iota of uncertainty for the property owner. Even worse, it simply begins the process by which an entrepreneur actually makes a specific application for an incinerator on the site.

Initially, the Court must assume that while an entrepreneur could *theoretically* begin making application before the designation process is concluded, common sense tells us that no prudent entrepreneur is going to spend hundreds of thousands of dollars in design, engineering, technical and legal costs until the site is available to a legal certainty.

Thus, the 23.5 months of the application process (probably more like 34 months allowing for hearing and appeal times) is a "consecutive sentence" not a concurrent one — for the victimized property owner!

Let us assume that we are now at the end of the process — a site was designated after 33-48 months Thus, after some 56-92 months the property owners of the designated site get an offer of compensation — finally!

But how does this effect petitioner Cobblestone's premises? Only a small to medium size part of its property may be within

the ½ mile from the site within which land must be purchased. How is it to be compensated for the total loss of its land for its lawfully zoned purpose? Unless the newly-licensed entrepreneur is willing to buy the whole tract, Cobblestone-Penn must wait for condemnation, which, pursuant to N.J.S.A. 13:1E-81 can *only* occur as specified:

> "b. Notwithstanding its land acquisition and conveyance powers provided in subsection a., the commission shall not implement those powers with respect to any land or interest therein unless:
>
> (1) The site on which the facility would be constructed has been adopted by the commission pursuant to the provisions of this act;
>
> (2) An agreement has been entered into between the commission and the hazardous waste industry whereby compensation for the land or any interest therein acquired by the commission will be provided by the hazardous waste industry;
>
> (3) The hazardous waste industry has already obtained the approval of the department of the registration statement and engineering design for the major hazardous waste facility to be constructed on the land."

Under the unique procedures established by the Act, thus, a property owner:

> 1. faces instant and almost total loss of property rights because of the peculiar and frightening nature of a hazardous waste incinerator which precludes almost any reasonable use on either a short-term or long-term basis;

2. will not know in general if his property is to be taken for a *minimum* of 48 months (the "targeting" and formal "designation" phase);

3. Will not know *exactly* how much of his property is to be taken for an additional *minimum* of 23 months (the application phase); and

4. may not be compensated for his loss until an unspecified time when the preconditions necessary for condemnation have been met.

While the foregoing analysis has focused on the situation of Cobblestone-Penn, we submit that even assuming that the other property owners are, in fact, farmers who have suffered no *legal* loss from their inability to participate in Millstone's current building boom which has raised the price of farmland to over $20,000 per acre, the fact is that even farmers are deprived of reasonable use of their land as farmland.

Although we tend to regard agriculture as an "interim" use of land — until "something better" comes along — the fact is that agriculture is a business like any other and requires planning and investment. Significant investment in fertilizers and drainage tiles and their maintenance is imperative to successful agriculture. These investments are made on a planned basis. They require large expenditures in one year to reap benefits over a number of years. Their purpose is to retain the worth of the land for agricultural purposes. If the land is to be leased to another farmer, multi-year leases with requirements for making these investments are necessary to keep the quality of the farmland.

Given the uncertainty created by respondents' actions — given the total inability of the farmland owner to maintain his property in accordance with sound agricultural practices while the "yellow

cloud" hangs ominously overhead, we submit that respondents' actions have deprived all property owners herein of the reasonable use of their land.

Thus, we submit that the court below misconceived the effect of respondents' actions where he stated that petitioners may still continue to use their land as before. Clearly, they may not do so, for they can neither use their land prudently by making required investments in it nor can they commit it to other uses.

The facts here do not suggest mere diminution in the speculative value of land but massive interference with the owner's reasonable and lawful use thereof.

Because of the unique nature of the proposed hazardous waste incinerator and because of the uncertainty as to location and the uncertainty as to whether the process will take 48 months or 92 months or will ever happen at all — and because there is no statutory process for respondents under the statute to pay petitioners for their loss of the beneficial use of their property — we submit they are constitutionally entitled to compensation — compensation which the statute precludes respondents from paying.

Another significant concern not addressed by the court below is this: what would be petitioners' remedy if, after the 33 months minimum pre-designation and designation process is completed, no entrepreneur comes in to build an incinerator? (We may reasonably hypothesize that ocean burning, or the construction of a new incinerator by DuPont or Exxon eliminates the need for a Millstone incinerator). *Under the statute the property owners would not be eligible for any compensation nor would the "designation" of their land necessarily be withdrawn.* If the Commission does not of its own motion de-designate a site, the municipality must apply to the Commission to have this done

on behalf of the landowner. N.J.S.A. 13:1E-59(5)(c). Thus, some 33-48 months after the initial announcement targeting these hapless landowners they would still be in limbo — not compensated in any way nor free to use their land reasonably any more than they are today.

The Major Hazardous Waste Facilities Siting Act effectively prohibits development of petitioners' land and is thus constitutionally defective absent a finding that the statutory scheme is consonant with an intent to compensate landowners for such temporary or permanent loss of beneficial use.

The facts in the present case, when measured against the procedures set forth in the Major Hazardous Waste Facilities Siting Act, would seem to demand compensation to the property owners. The net effect of the respondents' action and the operation of the statutory procedure are to create an interim reservation of petitioners' lands for an unspecified duration of time and an unspecified extent of territory — thus, to deprive landowners of the reasonable use of their land.

> "We are in danger of forgetting that a strong public desire to improve a public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 160 L. Ed. 322 (1922) at 416.

II.

The statutory scheme embodied in the Major Hazardous Waste Facilities Siting Act is abhorrent to the United States Constitution in failing to guarantee property owners full and adequate compensation for temporary and permanent loss of the beneficial use of their property.

This brief has already suggested that interim relief for inverse condemnation in this matter is mandated by the Constitution but precluded by the statute.

But even beyond this fatal defect there is in the vagueness of the Act's procedures an equally serious failing. We have now established that an owner such as Cobblestone-Penn will be deprived of all reasonable use of his land for a period of not less than 56 months.

The next question is: At that point when condemnation is instituted will the owner as a *matter of law* be able to receive full compensation?

Were this an urban renewal case N.J.S.A. 20:3-28 would require that compensation be determined based on value as of the date of the declaration of blight. This is sensible in view of the decline in value following a declaration of blight.

But neither the Major Hazardous Waste Facilities Siting Act nor the Eminent Domain Act provides similar language for the present *unique* case. At N.J.S.A. 13:1E-81 there is a reference to the fact that compensation to be paid will be determined as provided in the Eminent Domain Act.

But absent a specific provision to the contrary, the Eminent Domain Act provides:

> "Just compensation shall be determined as of the date of the earliest of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee."

In the present case we can only assume that the date of valuation will be the date on which a condemnation action is commenced — some 56 months after the site is first "nominated".

Thus, under the logic espoused by respondents and the court below, the ultimate recovery of petitioner property owners would be based on valuation of their property:

— *not* as of the day of initial announcement;

— *not* as of the date of formal designation;

— *not* as of the day an application is approved;

but as of that day when condemnation actually began — a date not less than 56 long months after the property owners' nightmare first began.

Petitioners, therefore, submit that the process authorized under the Major Hazardous Waste Facilities Siting Act is blatantly abhorrent to the United States Constitution because on its face it places the property owner in a uniquely negative position of being targeted as a potential host property for toxic wastes and, for a period of at least 5 years thereafter, gives him neither the ability to use his property nor certainty as to the parameters of

his temporary or permanent loss nor temporary compensation or permanent compensation.

Finally, on that date when the Act may finally — and at that only possibly — afford compensation, it does so based on a valuation already diminished by 5 years of the property's being submerged in a yellow cloud of fear, emotion and threatened condemnation.

The court below rejected these arguments without reference to or consideration of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* ____ U.S. ____, 107 S. Ct. 2378, 96 L. Ed 2d 250 (1987) — the latest examination of the constitutional questions raised herein.

In the *First English* case, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action can relieve it of the duty to provide compensation for the period during which the taking was effective," 107 S. Ct. at 2389. In reaching this holding this Court treated the allegation in plaintiff's complaint that it had been deprived of all use of its property as true. The case was remanded for further proceedings not inconsistent with the Court's opinion.

The plaintiff in the *First English* case never established at trial that it had lost all use of its property. The allegation that it had was dismissed in the Superior Court of California on demurrer, *i.e.,* the Court ruled that even if all use of the property had been lost, just compensation was not due. 107 S. Ct. at 2382, and the case came to this Court on that ruling, as affirmed by the California Court of Appeals. Presumably, the Church will have to prove its loss of use on remand.

Petitioners in this case now stand before the Court in virtually

the same procedural situation as the First English Evangelical Lutheran Church of Glendale. Their complaint for just compensation was dismissed by way of summary judgment in the Superior Court of New Jersey, which judgment was affirmed by the Appellate Division and State Supreme Court.

Although the opinion below recognized that, for purposes of appeal, all the allegations of the complaint must be accepted as true, 115 N.J. at 160, the court below proceeded to affirm the summary judgment upon a factual determination that "plaintiffs have failed to establish that the beneficial use of their property has been destroyed by the Commission's actions," 115 N.J. at 169.

That determination of the Fifth Amendment question presented is, therefore, in conflict with the decision of this Court in *First English Evangelical Lutheran Church of America v. County of Los Angeles, California, supra,* and is the reason relied upon by petitioners for the allowance of the writ of certiorari. Rule 17.1(c).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
A-83 September Term 1988

SEYMOUR LITTMAN, individually and as Mayor of the Township of Millstone and THE TOWNSHIP OF MILLSTONE,

Plaintiffs,

and

DIANAMIC INDUSTRIES and COBBLESTONE PENN LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

v.

RICHARD GIMELLO, EXECUTIVE DIRECTOR AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

Defendants-Respondents.

THE TOWNSHIP OF EAST GREENWICH, a Municipal Corporation of the State of New Jersey, CARL A. BRESSLER, WALTER P. GEORGE, HARGREEN ASSOCIATES, MILTON S. DUNN, FREDERICK WAIBEL, ADELBERT THOMPSON, and ANNA PENNELL,

Plaintiffs,

v.

Appendix A

THE HAZARDOUS WASTE FACILITIES SITING COMMISSION and RICHARD GIMELLO, EXECUTIVE DIRECTOR,

Defendants.

Argued January 30, 1989 — Decided May 4, 1989

On certification to the Superior Court, Appellate Division.

Michael A. Pane argued the cause for appellants.

John A. Covino argued the cause for respondents (*Donald R. Belsole,* Acting Attorney General of New Jersey, attorney; *James J. Ciancia,* Assistant Attorney General, of counsel; *Francine A. Schott,* Deputy Attorney General, on the brief).

Lewis G. Adler submitted a letter in lieu of brief on behalf of *amicus curiae,* Gloucester County (*Hasbrouck & Uliase,* attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

Plaintiffs claim that the declaration of their property as a potential site for a hazardous-waste facility under the New Jersey Major Hazardous Waste Facilities Siting Act ("Act"), *N.J.S.A.* 13:1E-49 to -91, *L.* 1981, *c.* 279, constitutes a taking of property without just compensation in violation of the United States and

Appendix A

New Jersey Constitutions. We hold that it does not.

I

The New Jersey Hazardous Waste Siting Commission ("Commission") was established pursuant to the Act to designate sites for hazardous waste storage, treatment, and disposal. In March 1985 the New Jersey Major Hazardous Waste Facilities Plan was formulated by the Commission. The plan anticipated that within three years the amount of hazardous waste requiring off-site treatment would exceed present capabilities by at least 167,000 tons. Therefore, it called for the construction of one or two rotary kiln incinerators and one land-storage facility.

The Commission is statutorily charged with the responsibility of locating appropriate sites for the future construction of hazardous waste facilities needed by the State of New Jersey. *N.J.S.A.* 13:1E-59. After the Commission identifies a potential facility site, that site is tested to determine if it conforms to the regulatory criteria enumerated in *N.J.S.A.* 13:1E-57 and *N.J.A.C.* 7:26-13.1 to -13.7. If a site does not meet the criteria, it is dropped from consideration. If the site satisfies the specifications, the Commission determines whether to propose the site for adoption. Once a site is proposed, a grant is made to the municipality so that a suitability study may be conducted. *N.J.S.A.* 13:1E-59(a)(i). This site-suitability study is to be completed in six months and the results transmitted to the Commission.

Within forty-five days after receipt of the study, an administrative hearing must be held to determine the appropriateness of the site. The administrative law judge makes a recommendation concerning the site. Under *N.J.S.A.* 13:1E-59(a)(4), the administrative law judge cannot recommend

a site unless there is "clear and convincing evidence" that it will not constitute a substantial detriment to public health, safety or welfare. Once the Commission receives this recommendation, it may accept or reject it and adopt or withdraw the site. This final action is subject to judicial review. *N.J.S.A.* 13:1E-59(a)(5).

Following adoption of the site, private firms will submit engineering designs for the facility. On approval of a design, the Commission will enter into negotiations for the purchase of the adopted site. If these negotiations fail, the Commission has the power to condemn the property. *N.J.S.A.* 13:1E-81.

II

In February 1986, the Commission identified eleven potential facility sites. Seven of these sites were potential incinerator sites and four were possible land storage sites. At the start of this litigation, the Commission completed testing of two of the eleven sites[1], both of which were determined to be unsatisfactory.

This appeal arises from two separate actions brought by affected landowners and municipal officials of two of the potential sites — East Greenwich and Millstone.[2] Both suits alleged that the Act constituted a "taking" of property without just

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1. The Commission's authority to enter the land for this preliminary testing was upheld by the Appellate Division in *Forbes v. New Jersey Hazardous Waste Facility Siting Commission*, Docket No. A-5090-85T6 (Oct. 16, 1986), *cert.* denied, 107 N.J. 65 (1986).

2. Six lawsuits, including those brought by East Greenwich and Millstone, resulted from the Commission's identification of the 11 potential facility sites. Each was brought by the owners of the lands identified for testing, and/or the municipality in which the lands were located. In each the plaintiffs' claims were dismissed and judgment entered in the Commission's favor.

compensation and due process in violation of the United States and New Jersey Constitutions. The plaintiffs also questioned the authority of the Commission to enter their land to do the initial testing of the identified sites.

Plaintiffs made interlocutory applications to prevent the Commission from entering their property to test, but these requests were rejected by this Court on December 2, 1986.[3] Thereafter, the cases were consolidated, and plaintiffs moved for summary judgment on the issues of the Commission's authority to enter and test the site and whether the Act constituted a taking of property without just compensation or due process. The Commission cross-moved for dismissal of the complaints.

On January 7, 1987, the trial court, in an unpublished decision, granted defendant's motion for summary judgment and dismissed plaintiffs' complaints. It rejected their "taking" claim based on a long line of New Jersey cases, reasoning "that the mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected." It also rejected the plaintiffs' claims that a dimunition in market value or loss of financing constitutes a compensable taking. Nonetheless, the trial court recognized that in very limited circumstances an extraordinary delay on the part of the governmental authority in determining whether the property is to be condemned may lead to a finding of inverse condemnation. Hence, the trial court dismissed plaintiffs' claims without prejudice to plaintiffs to institute another action alleging inverse condemnation.

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3. This testing was subsequently done, and the East Greenwich site was dropped from consideration. However, as of November 29, 1988, the Millstone site has been formally proposed and a grant now will be made to Millstone so it can conduct a suitability study.

Appendix A

The plaintiffs in the consolidated actions appealed. The Appellate Division affirmed the trial court's order granting defendants summary judgment and dismissing the complaints substantially for the reasons stated in the trial court's opinion.

The plaintiffs filed a petition for certification seeking review only of the lower courts' judgments that there had not been a compensable "taking" of their property. Specifically, they claim that the identification of their property as a potential site for a hazardous waste incinerator, combined with the time involved in the siting process, has created a "yellow cloud" that hangs over their property and has denied them all beneficial use of the land. We granted certification. 111 *N.J.* 639 (1988).

III

Because we are "reviewing the dismissal of [plaintiffs'] claims as legally insufficient, we must accept as true all the allegations of the complaint, the affidavits and products of discovery submitted on [their] behalf. We must also draw those reasonable inferences that are most favorable to [their] cause." *Portee v. Jaffee,* 84 *N.J.* 88, 90 (1980).

There are two affected landowners involved in the instant case, Dianamic and Cobblestone-Penn. Dianamic owns a portion of the property in Millstone designated as a possible site. Specific harm caused to Dianamic by designation as a potential site is not explicitly alleged. Cobblestone-Penn owns property adjacent to a portion of the possible site, and this property may have to be condemned inasmuch as *N.J.S.A.* 13:1E-57 requires development of a "buffer zone" between the facility and certain land around it.

Prior to the identification of the site, Cobblestone-Penn was

planning to develop a senior citizens mobile-home park on its property. This plan fell through following the identification of the property, and Cobblestone-Penn claims the Act has prevented it from using its property for its zoned purpose. It appears the financial backers for the trailer park became uneasy about the identification and withdrew financing, and Cobblestone-Penn could not find backing elsewhere. Also, Cobblestone-Penn takes the position that senior citizens' susceptibility to respiratory ailments renders this property unsuitable for such a purpose.

Although neither landowner appears to be involved in substantial farming operations, both assert that the threat of condemnation has made it unfeasible for them to make initial investments necessary for a long-term, successful farming operation.

IV

Both article I, paragraph 20 of the New Jersey Constitution and the fifth and fourteenth amendments to the United States Constitution prohibit the government from taking property without paying just compensation. The protections afforded under both constitutions are coextensive. *See Rieder v. State Dep't of Transp.*, 221 *N.J. Super.* 547, 553 (App. Div. 1987).

The clearest example of a taking is a situation in which property is physically invaded. 2 *Nichols on Eminent Domain*, § 6.05 at 6-34 (J. Sackman ed. 1985). Traditionally, physical invasion was an indispensable element of a "taking" claim. Note, *A Proposal for Compensating Landowners for the Effects of Urban Redevelopment*, 5 *Wm. Mitchell L. Rev.* 165, 171 (1979). This requirement, however, began to erode, and "[i]t is generally held in New Jersey [and] elsewhere . . . [that] in a few narrowly

defined situations" compensation will be awarded for "noninvasive" governmental activity: namely, off-site activities that spill-over onto the claimant's property; diminition in value flowing from governmental regulation; and diminution in value caused by pre-taking activities. Payne, *A Survey of New Jersey Eminent Domain Law,* 30 *Rutgers L. Rev.* 1111, 1188 (1977). This case involves the third type of claim (pre-condemnation activity).

Government plans ordinarily do not constitute invasion or taking of property. *Danforth v. United States,* 308 *U.S.* 271, 60 *S. Ct.* 231, 84 *L. Ed.* 240 (1939); *Wilson v. Long Branch,* 27 *N.J.* 360, *cert. den.,* 358 *U.S.* 873, 79 *S.Ct.* 113, 3 *L.Ed.*2d 104 (1958). "The mere plotting and planning in anticipation of condemnation without any actual physical appropriation or interference does not constitute a taking." *Kingston East Realty Co. v. State of N.J.,* 133 *N.J. Super.* 234, 239 (App. Div. 1975); *accord Wilson v. Long Branch, supra,* 27 *N.J.* at 374 (no taking where there is a declaration that property is in blighted area); *Rieder v. State Dep't of Transp., supra,* 221 *N.J. Super.* at 555 (no taking upon the filing of a preservation alignment map by the Department of Transportation); *Schnack v. State,* 160 *N.J.* Super. 343, 349-50 (App. Div.) (same), *certif.* den., 78 *N.J.* 401 (1978); *Far-Gold Constr. Co. v. Chatham,* 141 *N.J. Super.* 164, 169 (App. Div. 1976) (no taking where municipality's resolution expresses desire to acquire property for park as part of Green Acres program).

In contrast to a situation in which land has been physically-invaded, there is no precise formula that courts use to determine whether a compensable "noninvasive" taking has occurred. The issue depends on the facts of the case. In this case we find that none of the plaintiffs' allegations establishes that there has been

a compensable taking at this time. The identification of the eleven potential sites and the attendant publicity did not prevent the landowners from using or developing their property. Nothing in the Act or regulations thereto poses a legal impediment to the use or development of plaintiffs' land. Cobblestone-Penn's property is zoned for low-density cluster housing. There is no allegation that some other type of housing, besides senior citizens housing, could not be built on the property.

Cobblestone-Penn's allegation that it cannot build its senior citizens' trailer park because of a lack of financing does not rise to the level of a taking. Lost economic opportunities allegedly occasioned by pre-taking government activity do not constitute a compensable "taking" under either the United States or New Jersey Constitutions. *Barsky v. City of Wilmington,* 578 *F.Supp.* 170, 173 (D. Del. 1983) (absent unreasonable delay, difficulties in renting property caused by announcement of urban renewal plan not compensable); *Schoone v. Olsen,* 427 *F.Supp.* 724, 725 (E.D. Wis. 1977) (same); *East Rutherford Indus. Park v. State,* 119 *N.J. Super.* 352, 361 (Law Div. 1972) (inability to find lessees as a result of publicity surrounding proposed sports complex is *damnum absque injuria*). The loss of financing also does not amount to a taking. *Windward Partners v. Aryoski,* 693 *F.2d* 928, 929 (9th Cir. 1982), *cert. den.*, 461 *U.S.* 906, 103 *S.Ct.* 1877, 76 *L.Ed.*2d 809 (1983).

Plaintiffs' allegations concerning harm to potential farming operations are also comprised of nothing more than uncertainty caused by governmental planning and possible forgone economic opportunities. They can still use their land for farming and if it is eventually condemned, they will get a fair price for it. If it is not condemned, they can go on farming.

Likewise, we find the plaintiffs' contention that a compensable taking has occurred because the market value of their land has diminished as a result of publicity concerning the Millstone site equally unpersuasive. The cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking. As the Supreme Court stated: "[I]n the absence of an interference with an owner's legal rights to dispose of his land even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth amendment." *Kirby Forest Indus. v. United States,* 467 *U.S.* 1, 15, 104 *S.Ct.* 2187, 2197, 81 *L.Ed.*2d 1, 14 (1984) (footnote omitted); *accord Agins v. Tiburon,* 447 *U.S.* 255, ____ n.9, 100 *S.Ct.* 2138, ____ n.9, 65 *L.Ed.*2d 106, 113, n.9 (1984); *Danforth v. United States, supra,* ____ *U.S.* ____ at ____, ____ *S.Ct.* at ____, 84 *L.Ed.* at 246; *Frazier v. Comindes County, Miss. Bd. of Educ.,* 710 *F.2d* 1097, 1100 (5th Cir. 1983); *Wilson v. Long Branch, supra,* 27 *N.J.* at 374-75; *Jersey City Redevelopment Agency v. Bancroft Realty Co.,* 117 *N.J. Super.* 418, 423 (App. Div. 1971); *East Rutherford Indus. Park v. State, supra,* 119 *N.J. Super.* at 360-61.

Strong policy considerations underpin our holding that lost economic opportunities, forgone financing, and diminution in market value arising from government plans and their attendant publicity do not alone give rise to a compensable taking. "The public has an interest in keeping apprised of impending government action." *East Rutherford Indus. Park, supra,* 119 *N.J. Super.* at 361-62. The disposition of hazardous waste is a major concern of the State. The problem poses substantial health and economic threats to the citizenry. The public, therefore, has a strong interest in the activities of the Commission. To that end, the Legislature has provided in the Act that the Commission give notice of its

proposed plans to the public and then conduct public hearings throughout the state. *N.J.S.A.* 13:1E-58.

V

We have held, however, "that a compensable taking can occur when governmental action substantially destroys the beneficial use of private property." *Schiavone Constr. Co. v. Hackensack,* 98 *N.J.* 258 (1985); *Lomarch Corp. v. Mayor of Englewood,* 51 *N.J.* 108 (1968); *Morris County Land Improvement Co. v. Parsippany Troy Hills,* 40 *N.J.* 539 (1963). Nonetheless, it is only when "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, [that] there has been a taking of property within the meaning of the Constitution." *Washington Market Enterprises v. Trenton,* 68 *N.J.* 107, 122 (1975). We find no such threat in this case.

The instant case is easily distinguishable from those cases in which the government imposed a direct restraint on the use of the property, thereby depriving the owner of all beneficial use of the land for a significant period of time. *See, e.g., Schiavone Constr. Co. v. Hackensack, supra,* 98 *N.J.* at 264 (Hackensack Meadowlands Development Corporation imposed a moratorium on real estate development that covered plaintiff's 115 acres of undeveloped land); *Lomarch Corp. v. Mayor of Englewood, supra,* 51 *N.J.* 108 (municipal ordinance imposed one year restriction on right to develop land while municipality decided whether to purchase property); *Morris County Land Improvement Co. v. Parsippany Troy-Hills, supra,* 40 *N.J.* at 539 (zoning ordinance actually restricted use of swampland owned by plaintiff).

Plaintiffs' argument that their case is similar to the situation

the plaintiffs faced in *Washington Market Enterprises v. Trenton, supra,* 68 *N.J.* 107, is unpersuasive. We recognize that the plaintiffs have, to some extent, been placed in an unpleasant state of limbo as a result of the declaration and proposal of their land as a potential site. Their ability to make substantial investments has been curtailed. Realistically no one will invest in their property while there is still a risk that it will be condemned. Nonetheless, a comparison of the extreme facts in *Washington Market* and those presented in the instant case clearly discloses that at this time plaintiffs have failed to establish that the beneficial use of their property has been destroyed by its selection as a potential hazardous waste site.

In *Washington Market,* the facts were as follows. In the late 1950s Trenton undertook a feasibility study for redevelopment. The plan included construction of a mall, which would require condemnation of the plaintiff's property on which a commercial building was situated. Redevelopment began in 1963 just south of the planned mall area. In 1964 a hearing was held to discuss the prospect of declaring the mall area "blighted." No action was taken until 1967, when another meeting was held and the area declared blighted. Frequent reports of the redevelopment plans were released by city officials.

Trenton gradually began to acquire property in the target area. By 1970 half of the necessary land had been acquired. In May 1973 Trenton altered its redevelopment priorities and informed plaintiff and other remaining property owners that their lands would no longer be taken. This protracted process wreaked havoc on the plaintiff. Its tenants began moving out in 1963. It had difficulties finding long-term tenants. By 1972 the building was, for the most part, vacant. Its yearly income from the land fell from $160,000 in 1983 to $6,300 in 1973. The surrounding

area had greatly deteriorated. The practical effect of the city's ten-year course of action (and inaction) had been to leave the plaintiff with a worthless, useless, vacant building situated in a totally-devastated area. Moreover, Trenton abandoned the one plan that would have provided the owner with compensation, namely, its plan to condemn.

Unlike the plaintiff in *Washington Market,* the plaintiffs in the instant case are still able to make beneficial use of their property. At the time they initiated their action, they were free to use their land as they chose. No actual restriction was imposed on their rights to use their property. Indeed, there was a possibility that the Millstone site would not be selected. At the time they instituted their actions, there was, then, no "actual or threatened interference with the use of the property of such a permanent, serious or continuing nature to justify the conclusion that a 'taking' had occurred." *Kingston, supra,* 133 *N.J. Super.* at 240.

Moreover, plaintiffs make no specific allegations of deterioration of the surrounding area. As the court in *Schnack v. State, supra,* pointed out, "the holding in *Washington Market* clearly contemplates a reduction in value to 'near zero' . . . ." 160 *N.J. Super.* at 350. There is no allegation that plaintiffs have lost their property or that they are threatened with losing their property. There is no evidence that if the hazardous-waste project does not go through, the permanent value of their property will nevertheless be diminished. They will be left in a fine position to develop their land. On the other hand, if it does go through, they will receive compensation for their property — a possibility not open to the plaintiff in *Washington Market.* Most importantly, the plaintiff in *Washington Market* was threatened with condemnation for a substantial period of time — ten years. The

plaintiffs here have not had a "yellow cloud" over their land for nearly that long.

VI

Several factors must be considered and balanced in deciding whether a compensable-taking claim flowing from pre-condemnation activity has been established. First and foremost, extraordinary delay or other unreasonable conduct on the part of the condemning authority may give rise to a taking claim. *See Agins v. Tiburon, supra,* ____ *U.S.* ____ at n.9, ____ *S.Ct.* at n.9, 65 *L.Ed.* 2d at 113 n.9; *Barsky v. Wilmington, supra,* 578 *F.Supp.* at 173; *Kingston E. Realty Co. v. State of N.J., supra,* 133 *N.J. Super.* at 240; *A Survey of New Jersey Eminent Domain Law, supra,* 30 *Rutgers L. Rev.* at 1222; *Compensation for Landowners, supra,* 5 *Wm. Mitchell L. Rev.* at 200-02; *see also Lyons v. City of Camden,* 52 *N.J.* 89, 99 (1968) (condemning authority must act with "reasonable dispatch"); *Freeman v. Paterson Redevelopment Agency,* 128 *N.J. Super.* 448, 459 (Law Div. 1974) (unreasonable delay relevant to award of interest after taking), *rev'd on other grounds,* 138 *N.J. Super,* 539 (App. Div. 1978); *East Rutherford Indus. Park v. State, supra,* 119 *N.J. Super.* at 363 (action of condemning authority must clearly be expeditious).

In addition, the imminence of condemnation may also help to establish a taking claim. *A Survey of New Jersey Eminent Domain Law, supra,* 30 *Rutgers L. Rev.* at 1222. A property owner is more inclined to take or refrain from taking action in such circumstances. *Compensation for Landowners, supra,* 5 *Wm. Mitchell L. Rev.* at 197-98. As discussed, the severity of the injury and hardship to the property owner is yet another factor to be considered. *Washington Market, supra,* 68 *N.J.* at 122; *A Survey*

of New Jersey Eminent Domain Law, supra, 30 *Rutgers L. Rev.* at 1222.

All of the above factors are to be explored and weighed in conjunction with the public interest. Just as the public has an interest in keeping apprised of crucial government activities, so too it benefits from the cautious, deliberate administration of programs, such as hazardous waste disposal plans, that place encumbrances on private property.

Application of this balancing test in the instant case mandates the granting of summary judgment against the plaintiffs. They have made no showing of unreasonable conduct or extraordinary delay on the part of the Commission. Indeed, the Commission has already formally proposed the Millstone site and rejected the East Greenwich site. Further, at the time this matter was before the trial court the Commission had already rejected two other potential sites. Condemnation was hardly imminent when plaintiffs' action was brought, since they were — and still are — only part of a larger group of property owners whose lands are subject to consideration. Also, as shown, they fail to allege injuries comparable to those suffered by the plaintiff in *Washington Market.*

Essentially, plaintiffs claim a present taking based on conjecture about future facts. They contend that the procedures under the Act provide for an excessive period of delay of between forty-one to 101 months from the time of the identification of a potential site to its eventual condemnation. As the trial court correctly held, however, the question is whether the Commission's actions to date constitute a taking. The procedures under the Act on their face are not unreasonable. We decline to speculate about whether in practice their implementation will result in delays that

are so excessive as to constitute a taking.

It is unwise and unnecessary to deal with such speculative and hypothetical questions. We find no evidence in the record that the government is unduly delaying the processes. If the property is ultimately condemned, damages, if any, will be properly ascertained at that point. If the property is not condemned and no decision is made concerning condemnation for an excessively long period of time, then plaintiffs can renew their inverse condemnation claims. At this time plaintiffs have failed to establish that the beneficial use of their property has been destroyed by the Commission's actions.

Accordingly, the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, and Stein join in this opinion. Justice O'Hern did not participate.